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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. AARON KELLEY, Defendant and Appellant.	H037021 (Santa Clara County Super. Ct. No. C1075864)

Defendant Aaron Kelley appeals from the trial court's termination of his probation and drug treatment under Penal Code section 1210.1[1] (hereafter "Prop. 36"). Defendant was placed on Prop. 36 probation after pleading guilty to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). Upon his second violation of probation, which included an allegation that defendant was charged with a non-drug related felony in a new case, the trial court terminated his Prop. 36 probation and sentenced him to a four-year prison term. Defendant contends on appeal that the trial court improperly terminated Prop. 36 probation based on unamenability to treatment due to the pending new charges. Finding no abuse of discretion, we will affirm.

[1] All further unspecified statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged in May 2010 with possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a)), with allegations of four prior prison terms (§ 667.5, subd. (b)). After receiving notice that he was eligible for Prop. 36 probation and treatment, defendant pled guilty on May 11, 2010 to the violation of Health & Safety Code section 11377, subdivision. (a), and admitted the prior prison terms. The trial court suspended imposition of sentence for three years and placed defendant on Prop. 36 probation subject to various conditions, including that he not possess or consume any alcohol or illegal drugs.

Defendant admitted a first violation of probation on June 14, 2010, and he was ordered to submit to drug testing by his probation officer that day.[2] Defendant failed to appear for a review hearing on July 19, 2010, and the court revoked probation and issued a bench warrant for his arrest. On September 27, 2010, defendant appeared in court and the bench warrant was recalled. The trial court modified and reinstated Prop. 36 probation and set the matter for a further review hearing. Defendant appeared out of custody for scheduled review hearings on October 25, 2010 and November 22, 2010.

At the next scheduled review hearing on December 20, 2010, defendant appeared in custody, having been arrested the previous day for felony second degree burglary (§§ 459; 460, subd. (b)), possession of burglar's tools (§ 466), and resisting a peace officer (§ 148, subd. (a)(1)). Defendant was arraigned on probation violation allegations that he tested positive for alcohol on November 27 and 29, 2010; provided a dilute urine sample on November 16, 2010; and was terminated from a substance abuse treatment

[2] The record does not reveal the circumstances of this first violation.

program. He admitted the allegations as a second violation of his Prop. 36 probation. When asked by the court, he also confirmed that he "got arrested for a theft charge."[3]

Defendant's trial counsel requested at the December 20, 2010, hearing that sentencing on the probation violation be continued to January 5, 2011, in light of the pending charges from defendant's December 19 arrest. Defendant's counsel stated his belief that the burglary case "is going to be on a significant state level commitment." In setting sentencing for January 5, 2011, the court stated, "if the charge gets dismissed before then, the theft charge, I'll release him and keep him on Prop. 36 probation. [¶] If it doesn't get dismissed before then, I'll take him out of Prop. 36 . . . ."

Sentencing on the probation violation was apparently continued on January 5, January 6, and February 24, 2011.[4] At the sentencing hearing on April 14, 2011, the court considered whether to terminate defendant's Prop. 36 probation. A new petition to modify probation (§ 1210.1, subd. (d)) was filed the same day, in which the probation department recommended that defendant be disqualified from further Prop. 36 services.[5]

During the hearing, the prosecution stated that defendant's burglary charge was still pending, but invited the court to exercise its discretion to take action on the second

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[3] Defendant admitted only the new arrest; he did not admit he committed new crimes.

[4] The record does not include reporter's transcripts from these hearings.

[5] The petition alleged that defendant had sustained two previous probation violations. Though not specified in the petition, as previously noted (*ante*, pages 2 and 3) the record elsewhere refers to the first violation in June 2010 and the second in December 2010 for the positive alcohol tests and the dilute urine sample. The petition alleged a new, third violation for failing to provide proof of attendance at NA/AA meetings; failing to register as a narcotics offender under Health & Safety Code, section 11590; failing to complete a substance abuse treatment program; and committing new, non-drug offenses (stemming from defendant's December 19, 2010 arrest). The record does not indicate that the violations alleged in this new petition were sustained.

violation of probation admitted on December 20, 2010. Noting that defendant had been in custody since his arrest for burglary and related charges on December 19, 2010, and that he would likely remain in custody pending resolution of that case, the court concluded that defendant was "unavailable to participate in Prop[.] 36 treatment" and disqualified him from further Prop. 36 services. The court then summarized defendant's substantial criminal record beginning with his first prison commitment in 1992, citing four prison terms and numerous other convictions and parole violations. Rejecting the probation officer's recommendation of a county jail sentence, the court sentenced defendant to an aggregate term of four years in prison.[6]

DISCUSSION

On appeal, defendant contends the trial court erred when it terminated his Prop. 36 probation. Defendant argues that Prop. 36, also known as the Substance Abuse and Crime Prevention Act of 2000, mandates suspending imposition of sentence and granting probation to anyone "convicted of a nonviolent drug possession offense" (§ 1210.1, subd. (a)) if the person is not subject to exclusion under section 1210.1, subdivision (b). Specifically, defendant argues that termination of his Prop. 36 probation was improper because the trial court relied on the fact that defendant was facing a possible conviction of second degree burglary in an unrelated case.

We review the trial court's decision for abuse of discretion. A trial court has broad discretion in deciding to revoke probation, though it must act within both the bounds of reason and the legal principles which apply in a particular case. (See *People v. Beaty* (2010) 181 Cal.App.4th 644, 652.) Section 1210.1, subdivision (f) limits the

[6] Defendant was sentenced to the middle term of two years for methamphetamine possession (Health & Saf. Code, § 11377, subd. (a)), plus two one-year consecutive terms for two of the four prison priors (§ 667.5, subd. (b)).

responses available for violations of Prop. 36 conditions, and a trial court must therefore exercise its discretion in Prop. 36 probation cases consistent with those statutory limitations. (*Beaty*, *supra*, at p. 653.)

Prop. 36 Eligibility and Termination

Section 1210.1, subdivision (a) sets forth the eligibility criteria for Prop. 36 probation. The statute provides that "[n]otwithstanding any other provisions of law, and except as provided in subdivision (b)[7], any person convicted of a nonviolent drug possession offense shall receive probation." (§ 1210.1, subd. (a).) Section 1210.1 also discusses termination of Prop. 36 probation, and distinguishes between violations of drug related probation conditions and non-drug related conditions. Drug related conditions of probation include "a probationer's specific drug treatment regimen, employment, vocational training, educational programs, psychological counseling, and family counseling." (§ 1210.1, subd. (g).)[8] Notwithstanding the reference on December 20, 2010 to defendant's arrest the previous day on non-drug charges, the violations he admitted on December 20 appear to derive from drug related conditions.

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[7] Section 1210.1, subdivision (b) contains five exceptions to eligibility not at issue here, including convictions of a prior strike offense within the past five years, convictions in the same proceeding for a non-drug misdemeanor or for any felony, firearm involvement in the offense, refusal of drug treatment, and two prior failures in Prop. 36 treatment programs and proof of unamenability to drug treatment.

[8] If an individual violates a non-drug related condition or commits a new crime other than a non-violent drug possession offense, the court may order the defendant remanded for 30 days during which time hearings may be held to determine if probation should be reinstated. (Section 1210.1, subd. (f)(2).) If the trial court decides to reinstate probation in such a case, the court may intensify or alter the individual's treatment, order jail time not exceeding 30 days, and impose sanctions. (*Ibid.*)

Subdivision (f)(3) of section 1210.1 details what happens when an individual violates a drug related probation condition or commits a new non-violent drug possession offense.[9] On a first such violation, the court may revoke probation only if the prosecution proves both the alleged violation and that the individual poses a danger to the safety of others. (§ 1210.1, subd. (f)(3)(A).) For a second violation, the court must conduct a hearing to determine if Prop. 36 probation should be revoked. (§ 1210.1, subd. (f)(3)(B).) The trial court must revoke probation if "the state proves by a preponderance of the evidence either that the defendant poses a danger to the safety of others or is unamenable to drug treatment. In determining whether a defendant is unamenable to drug treatment, the court may consider, to the extent relevant, whether the defendant (i) has committed a serious violation of rules at the drug treatment program, (ii) has repeatedly committed violations of program rules that inhibit the defendant's ability to function in the program, or (iii) has continually refused to participate in the program or asked to be removed from the program." (*Ibid.*)

People v. Muldrow and Amenability to Treatment

Defendant argues that the trial court improperly considered him unamenable to drug treatment based on "pending, unresolved new criminal charges" that were "not a proper basis for a finding of unamenability." Defendant bases his argument on *People v. Muldrow* (2006) 144 Cal.App.4th 1038 (*Muldrow*). The defendant in *Muldrow* was arrested on a parole violation, during which a bindle of methamphetamine was found in

[9] As defendant points out, section 1210.1, subdivisions (d)(1) and (d)(2) also provide for modification and termination of drug-treatment probation based on the treatment provider notifying probation department and the court about the defendant's unamenability to drug treatment. However, these sections are not applicable to defendant as defendant's termination of Prop. 36 treatment was due to his probation violations, which are governed by section 1210.1, subdivision (f)(3).

his sock. (*Muldrow, supra,* 144 Cal.App.4th at 1041.) After Muldrow was convicted for methamphetamine possession, a presentence probation report indicated that he was ineligible for Prop. 36 treatment due to a parole hold and a previous warrant issued for failing to report for drug testing, failing to participate in a drug treatment program, and absconding from parole supervision. (*Ibid*.) The report stated he was "expected to return to custody for eight months on a parole violation." (*Ibid.*) The trial court determined that Prop. 36 was not available " 'because the defendant is subject to a parole hold and . . . would be unavailable for treatment in a Prop[.] 36 [program] . . . .' " (*Muldrow* at p. 1042.) The trial court then sentenced defendant to a prison term of seven years. (*Ibid.*)

The Fifth Appellate District reversed the trial court's decision, finding the trial court improperly speculated that Muldrow would be returned to prison for violating parole. (*Muldrow, supra,* 144 Cal.App.4th at p. 1047-1048.) The appellate court distinguished Muldrow's case from *People v. Espinoza* (2003) 107 Cal.App.4th 1069, where exclusion from Prop. 36 probation was upheld because the defendant was subject to deportation. The *Espinoza* court concluded that when a defendant faces a "substantial likelihood of imminent deportation, such that his probation cannot effectively be conditioned on completion of a drug treatment program . . . section 1210.1 does not preclude the trial court from exercising its discretion to deny probation." (*People v. Espinoza*, *supra*, 107 Cal.App.4th at 1076.)

The *Muldrow* court declined to apply *Espinoza*'s "substantial likelihood" test to parolees like Muldrow who might return to prison based on a parole violation. (*Muldrow, supra,* 144 Cal.App.4th at p. 1047.) Instead, it reasoned that since Muldrow "had not yet been committed to prison on a different offense . . . the act of placing him on probation would not have been superfluous at the time of sentencing." (*Muldrow, supra,* 144 Cal.App.4th at p. 1047.) Absent evidence in the record to establish Muldrow was actually unavailable for drug treatment and excludable from a grant of probation, he was

eligible for Prop. 36 probation. (*Id.* at 1048.) The court found error by the trial court "when it excluded defendant from Proposition 36 treatment based only on the expectation that he may be committed to prison on an alleged parole violation" (*ibid.*), noting that the "literal application of the eligibility provisions [in section 1210.1] would result in a finding that [Muldrow] is eligible for Proposition 36 probation." (*Muldrow, supra,* at p. 1048.)

Termination of Defendant's Prop. 36 Probation

Defendant argues that under *Muldrow,* Prop. 36 probation cannot be terminated based on the speculation that an individual will be sentenced to prison. Defendant contends that the trial court improperly relied on a possible prison sentence in his unrelated criminal matter to find that he was unamenable to drug treatment. However, *Muldrow* is distinguishable in several respects. First, *Muldrow* dealt with a defendant's initial eligibility for Prop. 36 probation (which is mandatory for all nonviolent drug offenders absent specific exclusions), not with revocation or termination of an existing probation grant. Unlike *Muldrow,* the issue here is whether the trial court properly terminated defendant's Prop. 36 probation after he admitted a *second* violation of its terms.

Further, *Muldrow* does not stand for the proposition that a defendant's likelihood of being sentenced to prison cannot be a factor in determining amenability to continued Prop. 36 treatment. *Muldrow* simply holds that the trial court may not base its determination of Prop. 36 eligibility solely on the expectation that the defendant may be returned to prison.[10] (*Muldrow*, 144 Cal.App.4th at p. 1048.)

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[10] Notably, the *Muldrow* court also acknowledged that individuals already sentenced to prison are unamenable to drug treatment by virtue of their incarceration. (See *Muldrow*, *supra*, 144 Cal.App.4th at p. 1044-1045; see also *People v. Esparza* (2003) 107 Cal.App.4th 691, 699.)

Here, the trial court's conclusion that defendant was unamenable to further drug treatment was not based solely on the expectation that he would be convicted and sent to prison on the pending burglary charge. The court also considered the violations in the case and noted defendant's lengthy criminal record and numerous violations in prior cases. This is not to say that defendant's pending charges did not affect the trial court's decision: The court cited logically to the fact that defendant would be unavailable for treatment while he was in custody awaiting trial in the burglary case, regardless of its outcome. At the time of sentencing, the court determined that defendant's other matter was set on the master trial calendar for May 23, 2011, which led the court to conclude that defendant had been "unavailable for a period of many months" and would continue to be unavailable while he went through the judicial process.[11] Although defendant's custody status pending resolution of the burglary case impacted his ability to satisfy the terms of Prop. 36 probation, that was not the court's only consideration when it terminated Prop. 36 probation. The court exercised its discretion to find defendant unamenable to further Prop. 36 treatment based not only on his custody status but also on his history of noncompliance in this and other cases. We find no error by the trial court in revoking defendant's Prop. 36 probation.

DISPOSITION

The judgment is affirmed.

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[11] On April 20, 2012, we granted the Attorney General's request for judicial notice that defendant's burglary case was set for a readiness conference on April 3, 2012 and was on the trial court's master trial calendar for May 7, 2012. While it appears that defendant ultimately waited more than a year for the burglary case to get to trial, we agree with defendant that the relevant facts here are those existing at the time of sentencing on April 14, 2011.

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GROVER, J.*

WE CONCUR:

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RUSHING, P.J.

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ELIA, J.

*Judge of the Monterey County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.